UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

No. 03-1742
Filed: June 16, 2004

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 16th day of June, Two Thousand and Four.

PRESENT: HON. JOSEPH M. MCLAUGHLIN,
HON. REENA RAGGI,
Circuit Judges,
HON. RICHARD J. HOLWELL,*
District Judge.

* The Honorable Richard J. Holwell of the United States District Court for the Southern District of New York, sitting by designation.

UNITED STATES OF AMERICA,

Appellee,

v.

SANJAY R. SARDANA,

Defendant-Appellant.

APPEARING FOR APPELLANT:

ROGER BENNET ADLER (Robert A. Ugelow, *of counsel*), Brooklyn, New York.

APPEARING FOR APPELLEE:

ADAM M. ABENSOHN, Assistant United States Attorney (Susan Corkery, Assistant United States Attorney, *on the brief*), *for* Roslynn R. Mauskopf, United States Attorney, Eastern District of New York, Brooklyn, New York.

SUMMARY ORDER

Appeal from the United States District Court for the Eastern District of New York (I. Leo Glasser, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the district court's judgment of conviction, entered on December 4, 2003, is AFFIRMED.

Defendant-Appellant Sanjay Sardana was convicted after a jury trial of removing his three-year old daughter from the United States and retaining the child in India for several months with the intent to obstruct the lawful exer-

cise of parental rights by the child's mother, his estranged wife, in violation of the International Parental Kidnapping Crime Act ("IPKCA"), *see* 18 U.S.C. § 1204. Sardana now appeals from the judgment of conviction pursuant to which he was sentenced principally to a five-month term of imprisonment followed by five months of home detention, execution of which sentence has been stayed pending this appeal. We assume familiarity with the record and proceedings before the district court and hereby affirm the judgment.

1. *Sufficiency of the Evidence*

Sardana asserts that the trial evidence was insufficient to establish his guilt with respect to two aspects of the charged crime: his wife's parental rights and his own obstructive intent. A defendant raising a sufficiency challenge to his conviction bears a heavy burden because a reviewing court must affirm if the evidence, viewed in its totality and in the light most favorable to the government, *see United States v. LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002), would permit any rational jury to have found the essential elements of the crime beyond a reasonable doubt, *see United States v. Gaskin*, 364 F.3d 438, 459-60 (2d Cir. 2004). Applying these principles to Sardana's case, we conclude that the evidence amply supported conviction.

Specifically, we reject Sardana's argument that his wife's parental rights had to be proved through a court custody order. Section 1204 defines "parental rights" as the right to physical custody of a child, whether joint or sole, that can arise by court order, by agreement, *or* "by operation of law." 18 U.S.C. § 1204(b)(2). In determining what parental rights arise by operation of law, federal courts look to state law. *See United States v. Amer*, 110 F.3d 873, 878 (2d Cir. 1997); *see also United States v. Fazal-Ur-Rahe-*

man-Fazal, 355 F.3d 40, 45 (1st Cir. 2004). Under New York law, the application of which is undisputed in this case, "there is no confusion" that "the biological mother [ ] enjoys the right to physical custody of her children unless and until this right is terminated by law." *United States v. Amer*, 110 F.3d at 878. Thus, the government was not obliged to offer proof of a court custody order to secure Sardana's conviction; it could rely on established New York law.

We similarly reject Sardana's contention that the evidence was insufficient to prove his obstructive intent in light of his post-abduction notification to his wife that he had taken their child to India and his commencement of custody proceedings in that country. As we explained in *United States v. Amer*, 110 F.3d at 881-82, the IPKCA was enacted to deter one parent from removing a child from the United States to another country that is not a signatory to the Hague Convention in order to obstruct the rights of the other parent. It is no defense to such conduct that *after* unlawfully removing the child from the United States, a defendant commences legal proceedings in the foreign forum. *See id.* at 882 (noting that the defendant is limited to affirmative defenses provided in 18 U.S.C. § 1204(c)); *see also United States v. Fazal-Ur-Raheman-Fazal*, 355 F.3d 43, 46 (affirming § 1204 conviction of defendant who, after absconding with child to India, notified wife of travel to that country and filed court custody action). At trial, Sardana admitted that his reason for surreptitiously taking his daughter to India was the expectation that the courts of that country would accord his wife fewer parental rights than the courts of New York. Trial Tr. at 226-28. By itself, this testimony sufficed to support a reasonable jury's finding of obstructive intent.

2. *Evidentiary Rulings*

Sardana appeals three evidentiary rulings by the district court: (1) the admission of an out-of-court statement by Ms. Sardana to State Department employee Nyda Budig; (2) the preclusion of Sardana's testimony regarding legal advice he received from an Indian attorney; and (3) the exclusion of evidence of alleged personal misconduct by Ms. Sardana. We review these evidentiary rulings deferentially for abuse of discretion, *see United States v. Abreu*, 342 F.3d 183, 190 (2d Cir. 2003), and conclude that there was no abuse in this case.

Allowing Ms. Budig to testify to an out-of-court statement by Ms. Sardana about her difficulty contacting her daughter in India was permissible background to Ms. Budig's own actions. *See Ryan v. Miller*, 303 F.3d 231, 252-53 (2d Cir. 2002). The court's failure to give a limiting instruction did not prejudice Sardana given that Ms. Sardana testified directly to the same facts and was subject to cross-examination. *See generally United States v. Reyes*, 18 F.3d 65, 70-71 (2d Cir. 1994).

Neither did the district court abuse its discretion in refusing to allow Sardana to testify to responses he may have received from an Indian attorney to e-mail inquiries about bringing his daughter to India to pursue a custody action. The singular value of such evidence was to support an argument that Sardana believed his conduct was lawful. *See generally United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1194 (2d Cir. 1989). In fact, Sardana himself was allowed to testify at length about his legal research, his communication with Indian counsel, and his conclusion that his actions in removing his daughter from the United States to India were legal. IPKCA, however, does not require proof that defendant knew his conduct

was against the law; its *mens rea* requirement is simply that a defendant remove a child from the United States with the intent to obstruct the proper exercise of parental rights. *See generally United States v. Remini*, 967 F.2d 754, 757 (2d Cir. 1992) (holding reliance on advice of counsel irrelevant to contempt conviction because the law contained no requirement that "defendant be shown to have known of, and intended to violate, the statute which makes it a crime to consciously disregard an order of the court" (internal quotation marks omitted)). Because Sardana admitted precisely this intent in his trial testimony, his personal belief that his conduct was lawful, whether a product of his own research or of any advice he may have received from an Indian attorney, was irrelevant to culpability. For this same reason, we reject Sardana's challenge to the district court's charge, which did not instruct the jury on an advice-of-counsel defense.

Finally, the district court did not abuse its discretion in excluding evidence suggesting that Ms. Sardana was unfit to be a custodial parent. Such evidence might have been relevant if Sardana had pursued a custody challenge against his wife in New York courts. It could not, however, justify his removal of their child from the United States to India in order to obstruct his wife's exercise of parental rights. *See United States v. Amer*, 110 F.3d at 880-82.

3. *Jury Charge*

Sardana faults the district court's jury charge for (1) instructing, as a matter of law, as to Ms. Sardana's parental rights; and (2) failing to charge an advice-of-counsel defense. Reviewing the jury charge *de novo*, *see United*

States v. Wilkerson, 361 F.3d 717, 732 (2d Cir. 2004), we find no error.

We have already rejected Sardana's second point in our discussion of his evidentiary challenges. As for the first point, we preliminarily note that the district court correctly charged the jury that Sardana could not be convicted unless it was convinced beyond a reasonable doubt that he had acted with intent to obstruct his wife's parental rights. Sardana's intent was a disputed issue of fact for the jury to resolve, and properly submitted for its consideration. But the existence of his wife's parental rights was a matter of law. Once the trial judge instructed the jury on the rights accorded a biological mother under New York law, there simply was no question of fact regarding parental rights that required jury resolution. Thus, we conclude that there was no error in the charge.

4. *Adjustment for Acceptance of Responsibility*

Sardana faults the district court for denying him "acceptance of responsibility" consideration. *See* U.S.S.G. § 3E1.1. A sentencing court's determination of the issue of acceptance is accorded "great deference on review", *see id.* cmt. n.5, and "will not be disturbed unless it is without foundation." *United States v. McLean*, 287 F.3d 127, 133-34 (2d Cir. 2002) (internal quotation marks omitted). That is not this case.

Section 3E1.1 consideration is generally not available to defendants who put the government to the burden of proof at trial. Sardana submits that his case falls within an exception for defendants who "go[ ] to trial to assert and preserve issues that do not relate to factual guilt." U.S.S.G. § 3E1.1, cmt. n.2. It is doubtful that Sardana falls within this excep-

tion. First, as the district court observed, Sardana's stubborn refusal to acknowledge that his conduct was criminal persisted after verdict and through his pre-sentence interviews. In any event, Application Note 2 indicates that the acceptance of responsibility exception for defendants who go to trial often depends on pre-trial statements and conduct acknowledging the misconduct. *See id.* The record is devoid of such evidence. Accordingly, we uphold the district court's refusal of § 3E1.1 sentencing consideration.

In sum, because we find all of Sardana's points on appeal to be without merit, the district court's December 4, 2003 judgment of conviction is hereby AFFIRMED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK

/s/ LUCILLE CARR 6/16/04
By Lucille Carr Date

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 03-1742
Filed: August 2, 2004

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 2nd day of August, Two Thousand and Four.

Before: Hon. Joseph M. McLaughlin
Hon. Reena Raggi
Circuit Judges
Hon. Richard Holwell,
*District Judge**

UNITED STATES OF AMERICA,

Appellee,

v.

SANJAY R. SANDANA,

Defendant-Appellant.

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* The Honorable Richard Holwell of the United States District Court for the Southern District of New York, sitting by designation.

IT IS HEREBY ORDERED that the motion to stay the mandate is DENIED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK
by

/s/ ARTHUR M. HELLER
Arthur M. Heller
Motions Staff Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 02 CR 1311 (ILG)

UNITED STATES OF AMERICA,

Plaintiff,

v.

SANJAY SARDANA,

Defendant.

MEMORANDUM AND ORDER

GLASSER, United States District Judge:

The defendant was convicted, after a trial by jury, of violating 18 U.S.C. § 1204, which provides in relevant part that:

> (a) whoever removes a child from the United States or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined . . . or imprisoned . . . or both.
>
> (b) As used in this section—
>
> * * *
>
> (2) the term "parental rights," with respect to a child, means the right of physical custody of the child—
>
> . . .

> (B) whether arising *by operation of law*, court order, or legally binding agreement of the parties. (emphasis added).

Paragraph (c) provides for three specific affirmative defenses, neither one of which is applicable here nor were they claimed to be.

The defendant was sentenced to a term of imprisonment for ten months, five months to be served in the custody of the Bureau of Prisons and five months in home detention as a condition of supervised release. The defendant was released on bail pending notification by the United States Marshal of the date upon which he should voluntarily surrender.

A notice of appeal from his conviction and sentence was timely filed, and before the Court is his motion pursuant to 18 U.S.C. § 3143(b) which provides in relevant part:

> (b) Release or detention pending appeal by the defendant . . . (2), the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal . . . be detained, unless the judicial officer finds—
>
> (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and
>
> (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—

(i) reversal,

(ii) an order for a new trial,

(iii) a sentence that does not include a term of imprisonment, or

(iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

The statute thus requires the district court to find before granting bail pending appeal:

(1) that the defendant is not likely to flee or pose a danger to any other person or the community;

(2) that the appeal is not for purpose of delay;

(3) that the appeal raises a substantial question of law or fact; and

(4) that if a substantial question is decided in favor of the defendant on appeal, it is likely to result in reversal or a new trial.

The factor that is decisive of this motion is whether the appeal raises "a substantial question of law or fact." The Court, in *United States v. Randell*, 761 F.2d 122 (2d Cir. 1985) (Feinberg, J.), resorted to three cases which had previously addressed that factor: *United States v. Miller*, 753 F.2d 19 (3d Cir. 1985); *United States v. Giancola*, 754 F.2d 898 (11th Cir. 1985); and *United States v. Handy*, 753 F.2d 1487 (9th Cir. 1985), and wrote, at 125:

> The *Miller* court defined a substantial question as "one which is either novel, which has not been decided by controlling precedent, or which is fairly doubtful." 753 F.2d at 23. *Giancola* held that a substantial question "is one of more substance than would be necessary to a finding that it was not frivolous. It is a 'close' question or one that very well could be decided the other way." 754 F.2d at 901. *Handy* defined substantial as "fairly debatable." 753 F.2d at 1490. We do not believe that these definitions of "substantial" differ significantly from each other, but if we were to adopt only one, it would be the language of *Giancola*.

If the court finds that a substantial question is raised on appeal, it must then decide whether the question is "so integral to the merits of the conviction . . . that a contrary appellate holding is likely to require reversal or a new trial," citing *Miller*, *supra*, 753 F.2d at 23. Absent a finding of a substantial question, this second finding is superfluous.

At an initial hearing on the motion, Judge Learned Hand's oft-cited belief that above the portal of every courthouse in the land should be engraved the immortal words ascribed to Oliver Cromwell, "think, I beseech ye in the bowels of Christ that ye may be mistaken," was perhaps too heavily impressed upon my consciousness and cautioned against the hubris of deciding the merits of an appeal from my own trial rulings. Upon reflection, however, it became clear that such timidity was to surrender a determination § 3143 required the district court to make, and that to avoid making it would result in granting bail in most

cases pending appeal, excepting those in which it could not be in accordance with § 3143(b)(2).[1]

The defendant has specifically identified the questions which he believes are substantial and which require that his motion be granted. Each will be considered in turn:

A. (1) *No Court Order Awarding Custody Was Flouted by the Defendant.*

It is his view, in this regard, that in prosecuting him, the government intended to extend the reach of *United States v. Amer*, 110 F.3d 873 (2d Cir. 1997), in which the biological mother had obtained an order from the Family Court in Queens awarding her full custody of the children her husband flouted by removing them to Egypt.

That view is an assertion of the plainly indefensible view that a natural parent must first obtain a court order declaring that he or she has parental rights vis-a-vis his or her child. That view also ignores the plain reading of § 1204, which defines "parental rights" as meaning the right to physical custody of the child arising by operation of law." That view also ignores the plain reading of *Amer* to the effect that ". . . there is no confusion under New York law that Mona, as the biological mother, enjoys the right to physical custody of her children unless and until this right is terminated." Indeed, the defendant, making reference to N.Y. Dom. Rel. Law § 81, acknowledges that right, and acknowledged it in his testimony as well. (Tr. at 227).

[1] In *Spector Motor Service, Inc. v. Walsh*, 139 F.2d 809, 823 (2d Cir. 1943), Judge Hand also wrote: "Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant; on the contrary I conceive that the measure of its duty is to divine as best it can, what would be the event of an appeal in the case before it."

In light of the foregoing, it would be and is, superfluous to add that the defendant acknowledged being advised by a judge of the Family Court that "any attempt to remove this child from this jurisdiction without the mother's consent is going to be dealt with very harshly" (Tr. at 221), and that there was an outstanding warrant for his arrest. (Tr. at 237).

(2) *The Defendant Promptly Moved in a Court of Law to Vindicate Custody Rights* and

(3) *The Complaining Spouse Participated in the Legal Forum Selected by the Defendant.*

To respond to those grounds as raising "substantial" questions would, in my view, be to dignify them and, by implication, suggest that they are meritorious and warrant a response. At the risk of both, I venture to believe that no court would find that § 1204 was not violated where the defendant, by deceiving her (Tr. at 216) and without her consent, removes a child from the home and custody of her mother and travels to India, a 15 hour flight (Tr. at 232), and institutes a proceeding in an Indian court not to "vindicate custody rights" as he would have it, but because he was concerned that a United States court would find in her favor. (Tr. at 227-29). I would also venture to believe that no court would find § 1204 was not violated because the mother was compelled to fly to India for fear that her rights would be adversely affected by an Indian court in her absence.

I would also note that among the affirmative defenses specifically provided by § 1204, neither the institution of a proceeding by the offending spouse, nor the appearance in such a suit by the victim spouse is mentioned.

(4) *No Attempt Was Made to Secrete the Couple's Child from Appropriate Access to the Parent.*

This ground is as flawed as are (2) and (3) and, in addition, is belied by the record. Not only had the defendant lied to the mother that he would return the child the same day that she permitted him to visit with her by spiriting her to India without her consent, he did not tell her where he was taking the child. She did not learn that he was in India until three days later, after calling the police and his father in Canada, and hearing from him five or six days later. (Tr. at 55-58).

I venture to believe that no court would hold that § 1204 was not violated where a defendant unlawfully removed a child half-way around the world and then advised the mother that she can come there if she wished to have access to her child.

B. Erroneous Admission of Hearsay.

The hearsay complained of, testimony by Nyda Budig, Chief of the American Citizens Service Unit of the United States Embassy in India, that Mrs. Sardana had once told her that she wasn't allowed to speak with her daughter, is surely harmless. Mrs. Sardana had testified to that fact extensively. (*See, e.g.*, Tr. at 66-69).

C. The Court's Charge.

The defendant alleges that the Court erred when it instructed the jury as follows:

> I must instruct you as a matter of law that Parul Sardana, the biological mother of Siena, at all relevant times had the right to physical custody of her

> child unless and until that right was terminated, and it never was.

Tr. at 314.

It is not, and never was, disputed that Parul Sardana was the mother of Siena; that she had parental rights "by operation of law," and that those rights were never terminated. That such charge was not erroneous was recently decided by *United States v. Fazal-Ur-Raheman-Fazal*, 2004 WL 93006 at *8 (1st Cir. Mass. 2004), a case virtually on all fours with this one.

D. Exclusion of Complainant's Misconduct.

The defendant unsuccessfully sought to elicit testimony that Mrs. Sardana had "a close, personal relationship" with a male companion at a time while still married to the defendant. Not only was that evidence irrelevant, but was properly excluded in accordance with Rule 611(a)(3) of the Federal Rules of Evidence.

E. Exclusion of Reliance on Legal Advice.

The record makes very clear the defendant's assiduous avoidance of obtaining the advice of a New York lawyer familiar with New York law, relying instead upon his own uninformed research and upon Indian counsel. In addition to being irrelevant, it is not an affirmative defense explicitly provided for by § 1204(c).

In sum, the defendant has not carried the burden of persuasion which is his, and the Court finds for all the foregoing reasons, that there is no substantial question of law or fact which would even arguably warrant granting this motion, that his appeal is for the purpose of delay; and it is hereby denied.

His request to extend the date for his voluntary surrender to February 28, 2004, to permit his appeal from this Order is granted.

Dated: Brooklyn, New York
January 26, 2004

/s/ I. LEO GLASSER
I. Leo Glasser

Copies of the foregoing were sent to:

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